

## ISSUES

**Docket No. 173,366**

The Administrative Law Judge limited claimant's permanent partial disability benefits to a 13.67 percent award based on claimant's permanent functional impairment. The Administrative Law Judge also awarded claimant 30.15 additional weeks of temporary total disability benefits.

Claimant contends he is entitled to a much larger award based on a work disability. Claimant also contends his average weekly wage should be based on a six-day work week instead of a five-day work week as found by the Administrative Law Judge.

The respondent, on the other hand, agrees with the Administrative Law Judge's Award except the respondent contends the claimant failed to prove his entitlement to an award of additional temporary total disability compensation.

**Docket Nos. 189,697 & 195,548**

Claimant also appealed these two docketed claims to the Appeals Board. However, at oral argument, the claimant abandoned the appeal. Therefore, the Administrative Law Judge's Award in regard to these two docketed claims remains in full force and effect.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW****Findings of Fact**

After reviewing the record, considering the briefs, and hearing the argument of the parties, the Appeals Board finds as follows:

The respondent does not dispute that the claimant injured both of his shoulders while performing his regular work activities for the respondent. Although claimant's shoulder injuries occurred over a period of time, January 31, 1992, was stipulated by the parties as the date of accident. For purposes of this appeal, the Appeals Board adopts January 31, 1992, as claimant's date of accident.

After a period of conservative medical treatment failed, orthopedic surgeon Lowry Jones, Jr., M.D., of Kansas City, Missouri, on June 1, 1993, performed a left shoulder scapulothoracic endoscopy with bursectomy and scapulopasty. Then on August 31, 1993, he performed the same operative procedure on claimant's right shoulder. Claimant was released to return to work on November 4, 1993, with restrictions for the left shoulder of only occasional pushing, pulling, and reaching above shoulder. Using both shoulders,

claimant was limited to carrying 50 pounds occasionally and 35 pounds frequently. A single lift was limited to 35 pounds occasionally and 20 pounds frequently. The doctor assessed claimant with a whole body functional impairment of 10 percent.

Claimant returned to work on November 4, 1993, to the job of trimming tongues which required claimant to pick up large pieces of meat off the conveyor belt and cut the meat in half. Shortly after claimant returned to work, he again developed pain and discomfort in his shoulders and arms. Finally, he had to take a day off on December 13, 1993. When claimant returned to work on December 14, 1993, respondent placed claimant on a leave of absence for medical reasons related to his work. The leave of absence was approved by respondent's representatives from personnel and health services.

Respondent returned claimant to work on March 31, 1994, to the job of washing cows in the stock yard with a high pressure hose. Because claimant remained symptomatic, respondent changed claimant to jobs of washing cattle necks, pulling straps, trimming tenders, and finally, sometime in September or October 1995, claimant was placed on a very light job of bagging cow tails. Claimant testified this was a regular job and although he had some pain and discomfort, he was able to perform this job. Dr. Jones also observed the job through a video tape and testified the job was within claimant's final permanent work restrictions.

Claimant remained employed by the respondent until he was terminated effective January 29, 1996. Claimant's last day worked was December 22, 1995, because he was arrested on December 23, 1995, as a result of a domestic dispute with his wife and charged with one count each of aggravated battery, sexual battery, and criminal trespass. Claimant remained in jail until January 10, 1996. Respondent's personnel manager, Rodger Brownrigg, testified respondent had a policy that employees were terminated for absenteeism if the employee failed to report to work for three days because the employee was in jail. After claimant missed work on December 26, 27, 28, 1995, he was subject to termination if he was convicted for the charged criminal activity. On January 29, 1996, claimant pled no contest to the charge of criminal trespass. In accordance with respondent's unexcused absent policy, claimant was terminated effective that day.

### **Nature and Extent of Claimant's Disability**

Claimant argues he remains entitled a work disability award because respondent's policy concerning termination for unexcused absences was inconsistently applied. Additionally, claimant argues he is entitled to a work disability because after he was

terminated, he reapplied for employment on November 7, 1996, and respondent failed to rehire claimant without an explanation.

Ms. Lynn Henning, a court service officer for Lyon County, Kansas, testified by deposition. Ms. Henning supervises convicted criminals in Lyon County who are placed on probation. Ms. Henning testified, during the nine years she has been a court service officer, she had supervised numerous IBP employee who had been arrested and convicted of crimes. Ms. Henning testified some of those employees remained employed by IBP after they were incarcerated for committing crimes. However, Ms. Henning could not verify that any of the IBP employees that she either presently supervises or had supervised were in jail more than three days before they were released and returned to work.

The Appeals Board concludes the evidence in this case proves the job claimant was performing at the time of his termination, bagging tails, was a regular job and not a temporary or make-up job to simply accommodate claimant's restrictions. However, respondent transferred the claimant to that job in an effort to place claimant in a job he could perform within his permanent work restrictions. If claimant had not been incarcerated and unavailable for work, he would have remained working for the respondent at a wage in excess of his pre-injury average weekly wage.

The Appeals Board concludes claimant was terminated by respondent for cause not related to his work injury. The reason claimant is no longer employed by the respondent is because of his criminal activity and his violation of respondent's unexcused absentee policy. The Appeals Board, therefore, concludes the presumption of no work disability, as contained in K.S.A. 1991 Supp. 44-510e(a), should be applied and claimant is limited to disability benefits based on his functional impairment. See Perez v. IBP, Inc., 16 Kan. App. 2d 277, 826 P.2d 520 (1991) and Velazquez v. IBP, Inc., Docket Nos. 168,347 and 169,293 (October 1996).

Not every termination for cause from a comparable wage job results in a denial of work disability. There can be violations of employer policies that result in a worker's termination that do not invoke the public policy considerations announced in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). See e.g. Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995) and Zarnowski v. Collingwood Grain, Inc., Docket 190,684 (April 1996). But wilful or deliberate employee actions that are tantamount to a refusal to work generally will. This case presents a close question because claimant's actions, while deliberate, did not occur at work and were not directed at his employment. Nevertheless, it was foreseeable that criminal conduct would result in an inability to comply with respondent's attendance policy. Foulk is applicable here.

In regard to claimant's argument that respondent failed to rehire claimant, the Appeals Board concludes an employer who discharges an employee for misconduct has no obligation under the Workers Compensation Act to rehire such employee. Refusing to rehire an employee that has been discharged for misconduct does not overcome the presumption of no work disability.

The Administrative Law Judge found claimant entitled to a 13.67 percent permanent partial general disability. That finding was determined by giving equal weight to the permanent functional impairment opinions of the three physicians whose functional impairment opinions were contained in the record. The Appeals Board agrees and affirms the Administrative Law Judge's finding in reference to claimant's entitlement to permanent functional general disability benefits.

### **Average Weekly Wage**

The Administrative Law Judge found claimant's average weekly wage on the date of his accident, January 31, 1992, was \$330.44. The Appeals Board affirms that finding. The wage statement admitted into the record for the 26 weeks next preceding this accident date showed claimant was working 40 hours per week at \$7.40 per hour or \$296.00, plus overtime of \$31.48 per week, and other pay of \$2.96 per week. The Appeals Board finds the letter dated July 28, 1997, included in respondent's workers compensation examiner LaRae Smith's deposition does not sufficiently identify whether the family medical and dental costs were the employer's or employee's costs in order to be included in claimant's average weekly wage computation.

The Appeals Board finds the claimant's testimony and the wage statement admitted into evidence are persuasive proof that claimant was expected to work a five-day week and not a six-day week. Claimant testified he worked on Saturdays when he was supposed to work. In Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991), evidence established claimant not only was expected to work on Saturdays but in fact worked most Saturdays or, at the very least, worked on Saturdays the majority of the time.

### **Additional Weeks of Temporary Total Disability Compensation**

Claimant claims he was temporarily and totally disabled from work for the period of December 15, 1993, through March 31, 1994, and October 10, 1994, through January 10, 1995. The Administrative Law Judge found the claimant was entitled to those weeks of additional temporary total disability compensation. However, the Administrative Law Judge incorrectly found the two periods represented 30.15 weeks instead of 28.58 weeks.

The Appeals Board affirms that finding and concludes claimant's testimony, respondent's personnel records, and Dr. Jones' testimony and medical records, as summarized below, support the conclusion that during those periods in question claimant's shoulder injuries resulted in claimant being unable to work.

Claimant was taken off work by Dr. Jones from the date of his first shoulder surgery of June 1, 1993, until November 4, 1993. Thereafter, claimant was released to return to work with permanent restrictions. Claimant testified he returned to work on November 4, 1993, to the job of trimming tongues which caused pain and discomfort in his hands and shoulders. Because of those complaints, respondent placed claimant on a work-related medical leave of absence on December 15, 1993, and claimant did not return to work until March 31, 1994. During this leave of absence, claimant returned to Dr. Jones who altered his work restrictions which placed the trimming of tongues outside of those restrictions.

On March 31, 1994, claimant returned to the job of washing cattle in the stock yards using a high pressure hose. This job also caused claimant pain and discomfort and respondent changed him to washing necks of cattle and then to pulling straps. Claimant again complained of pain and discomfort and was taken off the pulling strap job from October 10, 1994, until January 10, 1995, when claimant returned to reworking tenders. Claimant returned to see Dr. Jones during this leave of absence, and Dr. Jones altered claimant's permanent restrictions which eliminated claimant from performing the pulling strap job.

The findings and conclusions contained in the Administrative Law Judge's Award that are not inconsistent with the findings and conclusions of the Appeals Board are adopted by the Appeals Board as its own.

**AWARD Docket No. 173,366**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Jon L. Frobish's April 21, 1998, Award should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Armando Hernandez, and against the respondent, IBP, Inc., a qualified self-insured, for an accidental injury which occurred January 31, 1992, and based upon an average weekly wage of \$330.44.

Claimant is entitled to 71.58 weeks of temporary total disability compensation at the rate of \$220.30 per week or \$15,769.07, followed by 343.42 weeks at the rate of \$30.12 per week or \$10,343.81 for a 13.67% permanent partial general disability, making a total award of \$26,112.88.

As of December 31, 1998, there is due and owing claimant 71.58 weeks of temporary total disability compensation at the rate of \$220.30 per week or \$15,769.07, followed by 289.13 weeks of permanent partial compensation at the rate of \$30.12 per week in the sum of \$8,708.60 for a total of \$24,477.67, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$1,635.21 is to be paid for 54.29 weeks at the rate of \$30.12 per week, until fully paid or further order of the Director.

All authorized medical treatment expenses are order paid by the respondent.

The Appeals Board approves and adopts all other orders set forth in the Award.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 1998.

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BOARD MEMBER PRO TEM

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BOARD MEMBER

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BOARD MEMBER

c: Diane F. Barger, Wichita, KS  
Jennifer Daniels, Dakota City, NE  
Gregory D. Worth, Lenexa, KS  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Director